

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DENNIS ALLEN, MARY JANE
CRACRAFT, LELAN LITTRELL and
GLASS, MOLDERS, POTTERY, PLASTIC
AND ALLIED INDUSTRIAL WORKERS,
LOCAL NO. 41, AFL-CIO,

Plaintiffs,

vs.

LEONARD D. KRISTAL, and JOHN L.
CRARY,

Defendants.

Case No: C-1-01-159

Judge Herman J. Weber
Magistrate Judge Timothy S. Hogan

DEFENDANT JOHN L. CRARY'S
COUNTER-STATEMENT OF PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW IN
OPPOSITION TO THIRD-PARTY
DEFENDANT POLLY JONES' MOTION
FOR SUMMARY JUDGMENT

JOHN L. CRARY,

Cross-Claimant,

vs.

LEONARD D. KRISTAL,

Cross-Defendant.

JOHN L. CRARY,

Third-Party Plaintiff,

vs.

POLLY JONES, SHIRLEY MONROE,
JAMES THELAN,

Third-Party Defendants

I. FINDINGS OF FACT:

1. Polly Jones ("Jones") was the named Plan Administrator for the Lassen Group Benefit Plan during the Relevant Time Period.
 - a. Declaration of Jennifer Chen, Exhibit A.
 - b. Declaration of Jennifer Chen, Exhibit B.
2. As the Plan Administrator, Jones had complete authority to control and manage the plan, and had full discretion to determine eligibility, to interpret the plan and to determine whether a claim should be paid or denied, according to the provisions of the plan.
 - a. Declaration of Jennifer Chen, Exhibit A.
3. Jones' husband, Randy Pickering, owns Pickering Insurance Services.
 - a. Declaration of Jennifer Chen, Exhibit C.
4. Jones and Randy Pickering have been married for 20 years.
 - a. Declaration of Jennifer Chen, Exhibit D.
5. Jones was the Operations Manager at Pickering Insurance Services.
 - a. Declaration of Jennifer Chen, Exhibit E.
6. Jones instructed Leonard D. Kristal ("Kristal"), the CEO of The Lassen Companies, Inc. ("Lassen") on how much to pay for the health plan premiums to Great-West Life and Annuity Insurance Company ("Great-West") and where to send the payment.
 - a. Declaration of Jennifer Chen, Exhibit E.
7. Jones recommended Great-West to Kristal and convinced him to use Great-West as Lassen's health insurance carrier.
 - a. Declaration of Jennifer Chen, Exhibit F.
8. From February 1999 to August 1999, Pickering Insurance Services received more than \$20,000 in commissions for employees that enrolled in the health plan, in addition to sales commissions.
 - a. Declaration of Jennifer Chen, Exhibit G.

1 9. In March 2000, Jones drafted Lassen's proposed amendment to the health plan on behalf of
2 Lassen and directed Kristal to forward her proposal to Great-West.

3 a. Declaration of Jennifer Chen, Exhibit H.

4 10. Jones gave direction to Great-West to apply Lassen's deposit to its health premium
5 payment.

6 a. Declaration of Jennifer Chen, Exhibit I.

7 11. Jones had access to the Lassen health plan claim account's check transfer detail and
8 banking activities.

9 a. Declaration of Jennifer Chen, Exhibit J.

10 12. Jones and Great-West jointly made the determination to put an administrative hold on
11 Lassen's health insurance in 2000.

12 a. Declaration of Jennifer Chen, Exhibit K.

13 13. Jones did not inform Crary that Kristal had failed to pay health insurance premiums and
14 payments during the relevant time period.

15 a. Declaration of Jennifer Chen, Exhibit L.

16 14. Jones continued to serve as health plan administrator, even while the plan was placed on
17 administrative hold.

18 a. Declaration of Jennifer Chen, Exhibit M.

19 15. Jones continued to serve as health plan administrator, even while she knew claims were not
20 being paid.

21 a. Declaration of Jennifer Chen, Exhibit N.

22 16. Jones continued to serve as health plan administrator, even while she knew deducted health
23 insurance premiums were not being remitted to Great-West.

24 a. Declaration of Jennifer Chen, Exhibit O.

II. CONCLUSIONS OF LAW:

A. JONES WAS A NAMED FIDUCIARY UNDER ERISA.

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1); ERISA § 402(a)(2), 29 U.S.C. § 1102(a)(2).

B. JONES FUNCTIONED AS AN ERISA FIDUCIARY TO THE HEALTH PLAN.

ERISA § 3(21)(A); 29 CFR § 2509.75-8; *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988).

C. JONES BREACHED HER FIDUCIARY DUTIES AND CO-FIDUCIARY DUTIES.

ERISA § 404(a)(1)(B); ERISA § 404(a)(1)(D); ERISA § 405(a), 29 U.S.C. § 1105(a).

Dated: November 26, 2003

/s/ Stephen R. Felson

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CERTIFICATION OF SERVICE

I hereby certify that on November 26, 2003, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following.

David M. Cook (0023469)
Stephen A. Simon (0068268)
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1 I further certify that on November 26, 2003, I served by following by ordinary U.S. Mail:

2 Leonard Kristal (pro se)
3 107 Diablo Drive
4 Kentfield, CA 94904

5 /s/ Stephen R. Felson
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